IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 6747 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE A.K.TRIVEDI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made

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5. Whether it is to be circulated to the Civil Judge? : NO

KATHI ASHOK VALKUBHAI

Versus

DIST.MAGISTRATE BHAVNAGAR

Appearance:

MS DR KACHHAVAH for Petitioner

MR AJ DESAI ASSTT GOVERNMENT PLEADER for Respondent No. 1, 2, 3

CORAM : MR.JUSTICE A.K.TRIVEDI

Date of decision: 18/01/2000

ORAL JUDGEMENT

#. Heard Ms.D.R.Kacchwah, learned advocate for the petitioner and Mr. A.J.Desai, learned AGP appearing for respondents No. 1, 2 & 3.

#. The detention order dated 23-4-1999 passed by respondent No.1 - The District Magistrate, Bhavnagar against the petitioner in exercise of powers conferred under Section 3(2) of the Gujarat Prevention of Anti Social Activities Act 1985 (`PASA' for short') is challenged by way of this present petition under Article 226 of the Constitution of India.

#. That the grounds of detention served and supplied to the detenu under Section 9(1) of the PASA, a copy of which is produced at Annexure-B interalia indicates that in all two criminal cases punishable under Bombay Prohibition Act were registered against the petitioner at Gadhada police station on 20-10-98 and 23-2-99. That in each case, the country made liquor was seized from the possession of the petitioner / detenu. That both the cases are pending for trial in the court.

#. That three witnesses on assurance of anonymity have given information regarding the bootlegging activities of the petitioner vide statements dated 14-4-99, wherein, the incidents of 6-3-99, 27-12-99 and 16-1-99 respectively were stated. That on the basis of above stated material, the respondent No.1 - the detaining authority has come to the conclusion that the petitioner / detenu is bootlegger within the meaning of Section 2(b) of PASA. That enforcement of general provisions of law being insufficient to prevent the petitioner from continuing his prejudicial activities, detention order is necessary and hence the impugned order is passed.

#. It has been submitted on behalf of the petitioner at bar that the impugned order is bad in law on account of the non application of mind. It is submitted that before passing the order, the petitioner was released on bail in second case on 23-12-1999. However, the grounds of detention does not disclose any fact that the detaining authority has considered the availability of less drastic remedy like claiming of cancellation of bail granted to the petitioner though available under Section 437(5) of the CrPC and thereby, the subjective satisfaction reached by the detaining authority has been vitiated and has rendered the impugned order invalid.

#. That in the matter of ZUBEDABIBI RASIDKHAN PATHAN VS. STATE OF GUJARAT AND OTHERS 1995 (2) GLR 1134, the Division Bench of this Court has expressed the view that non consideration of less drastic remedy available under Section 437(5) of the CrPC claiming cancellation of bail amounts to non application of mind which vitiates the

subjective satisfaction, thus rendering the detention order bad in law. That the said view has been approved and endorsed in the proceeding of Letters Patent Appeal No : 1056 of 1999 decided on 15-9-99 by this Court (Coram : C.K.Thakker & A.L.Dave, JJ.).

#. On scrutiny of papers, it appears that the detaining authority has not considered the aspect of less drastic remedy like claiming cancellation of bail though in both the cases registered against the petitioner are pending for trial in the Court. In view of the said fact, it is difficult to sustain the impugned order.

#. As the petition succeeds on the aforesaid ground alone, it is not necessary to consider and decide the other contentions raised in the petition.

#. On the basis of the aforesaid discussion, the petition is allowed. The detention order dated 23-4-1999 passed by respondent No. 1 - The District Magistrate, Bhavnagar against the petitioner is hereby quashed and set aside. The petitioner - Kathi Ashok Valkubhai is ordered to be set at liberty forthwith, if not required in any other case. Rule to that extent is made absolute.

Date : 18-1-2000 [A.K.Trivedi, J.]

#kailash#